MOTION FILED

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No. 99-901

IN THE
SUPREME COURT OF THE UNITED STATES

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Motion For Summary Reversal

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT

I. As an Alternative to Granting Certiorari, This Court Could Summarily Reverse the Decision of the Sixth Circuit Because It Is Such an Outlier and Is Based on Circuit Precedent Whose Provenance Is Questionable 3

A. *Burrows*: The Background 3

1. *Morris v. Michigan State Bd. Of Educ.* 4
2. *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. V. OHSAA* 5
3. *Alerding v. OHSAA* 6

B. The *Burrows* Decision 7

CONCLUSION 10

APPENDIX A:

Opinion in *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 2000 U.S. Dist. LEXIS 574 (W.D. Mich. January 21, 2000).

TABLE OF AUTHORITIES

FEDERAL CASES

Alerding v. OHSAA, 591 F.Supp. 1538 (S.D. Ohio 1984).. 6

Alerding v. OHSAA, 779 F.2d 315 (6th Cir. 1985) 6, 7

Brenden v. Independent School District 742, 477 F.2d 1292 (8th Cir. 1973)..... 5

Burrows v. Ohio High Sch. Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989) 3, 7

Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982) 3

Communities for Equity v. Michigan High Sch. Athletic Ass'n, 2000 U.S. Dist. LEXIS 574 (W.D. Mich. January 21, 2000) 1, 2, 9

Dennin v. The Connecticut Interscholastic Athletic Conf., Inc., 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996)..... 3

Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch., 396 F.2d 224 (5th Cir 1968)..... 3

Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) 4, 5

NCAA v. Tarkanian, 488 U.S. 179 (1988) 1, 2, 4, 10

Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981) 3, 5

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 4, 5, 6

Title IX, 20 U.S.C. § 1681 *et seq.* 5

Petitioner's Motion For Summary Reversal

INTRODUCTION

By filing this Motion for Summary Reversal, Petitioner suggests to this Court an alternative method for resolving this matter should it not deem the granting of certiorari appropriate.

This Motion is triggered in substantial part by a remarkable and very recent decision of the United States District Court for the Western District of Michigan, which is part of the Sixth Circuit: *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, [MHSAA] 2000 U.S. Dist. LEXIS 574 (W.D. Mich. January 21, 2000).[1] Although bound by the decision of the United States Court of Appeals for the Sixth Circuit in the instant case, the district court in *Communities for Equity* refused to follow the *Brentwood Academy* decision because it is so at odds with this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), as to place the district court at risk of violating its duty to this Court's primacy in our judicial hierarchy.

In what can only be deemed an extraordinary decision that both supports Petitioner's position in this case and reinforces the strong dissent of Judge Merritt from the denial of rehearing *en banc*, the court in *Communities for Equity* found such a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*" that it could not follow *Brentwood Academy* and still be faithful to this Court's decision in *Tarkanian*. Petitioner will let the words of the court in *Communities for Equity* speak for themselves: The "Sixth Circuit's decision in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian* [footnote 13]," *Communities for Equity*, 2000

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[1] A copy of the decision in *Communities for Equity* is attached to this filing as an Appendix.

U.S. Dist. LEXIS 574 at *40,[2] and for that reason it was deemed "not controlling." *Id.* at *41. The court in *Communities for Equity* asserted that it owed fealty to this Court's analysis in footnote 13 of *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), and not to "the *Brentwood Academy* decision ... [which] cannot be reconciled with Footnote 13 in *Tarkanian*...." 2000 U.S. Dist. LEXIS 574 at *41.

The insubstantial character of Respondents' Brief in Opposition (BIO), as dramatically reinforced by the decision in *Communities for Equity*, suggests that this Court may deem the issues so definitively settled – and the decision of the Sixth Circuit Court of Appeals below such an outlier — that summary reversal would be an appropriate result in this case. This Motion supports the argument for summary reversal as an alternative, more truncated route for determination.

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[2] The analysis of the district court for the Western District of Michigan in *Communities for Equity* regarding the doctrinal significance of footnote 13 in *Tarkanian* tracks the argument made by Petitioner in its Petition for Writ of Certiorari, at 21-25.

ARGUMENT

I. As an Alternative to Granting Certiorari, This Court Could Summarily Reverse the Decision of the Sixth Circuit Because It Is Such an Outlier and Is Based on Circuit Precedent Whose Provenance Is Questionable

As support for summary reversal, it is important to note that Respondents contend that the "only post-*Blum* decisions in which a high school athletic association's state actor status has been analyzed, rather than simply accepted or assumed, both arise out of the Sixth Circuit." BIO at 8-9. Respondents' assertion is incorrect. The central Sixth Circuit precedent, upon which the panel below relied, is *Burrows v. Ohio High Sch. Athletic Ass'n*, 891 F.2d 122 (6th Cir. 1989). A careful analysis of *Burrows* and its doctrinal forebears is therefore appropriate to demonstrate the hollowness of Respondents' contention.

A. *Burrows*: The Background

The general principle that "[a]ctions of voluntary interscholastic athletic associations, of which public schools comprise part of the membership, constitute state action," *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 671 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996), has evolved from cases such as *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982), *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 653 (6th Cir. 1981) (cited in *Clark*), and *Louisiana High Sch. Athletic Ass'n v. St. Augustine High Sch.*, 396 F.2d 224, 227-

28 (5th Cir. 1968). Footnote 13 of this Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988), a post-*Blum* case, definitively established this general principle, and subsequent decisions have adhered to this general principle. *See* Petition for Writ of Certiorari, at 8 n.3, 10 n.6, & 21 n.12. The *Blum* trilogy, decided in 1982 and so important for the Respondents, was never a basis for wholesale reassessment of the vitality of these precedents. Indeed, footnote 13 of *Tarkanian* completely refutes Respondents' contention regarding the analytical significance of *Blum*.

Prior to *Tarkanian*, the Sixth Circuit had found, both implicitly and explicitly, that the regulatory conduct of secondary school athletic associations constituted state action.

1. *Morris v. Michigan State Bd. of Educ.*

In *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973), a regulation of the MHSAA barred two high school girls from Ann Arbor Union High School from participating in interscholastic tennis matches on behalf of their school. Apparently, there was no girls' varsity tennis team at the school, and mixed-gender teams were prohibited by the MHSAA regulation. In response to an action under 42 U.S.C. §1983 brought by the girls, the district court issued a preliminary injunction invalidating the MHSAA rule and enjoining the MHSAA from "[p]reventing or obstructing in any way the individual plaintiffs or any other girls in the State of Michigan from participating fully in varsity interscholastic athletics and athletic contests because of their sex." *Id.* at 1208.

On appeal, the Sixth Circuit upheld the issuance of the preliminary injunction. In upholding the preliminary injunction, the Court of Appeals limited the scope of the preliminary injunction to cover only "non-contact" sports. *Id.* at 1209.

In the Court of Appeals, the MHSAA "disput[ed] the jurisdiction of the district court." *Id.* A jurisdictional

challenge is another way of framing the state action issue since, in a challenge under 42 U.S.C. §1983, a district court lacks jurisdiction in the absence of state action. *See Brenden v. Independent School Dist. 742*, 477 F.2d 1292, 1295 (8th Cir. 1973) ("The High School League first contends that there is no jurisdiction over it under 42 U.S.C. §1983 because it is a voluntary organization not acting under the color of state law").[3] In affirming the issuance of the preliminary injunction against the MHSAA, the Court of Appeals expressly held that "the District Court had and has jurisdiction of this case." 472 F.2d at 1209. The Sixth Circuit, therefore, squarely and necessarily addressed the state action issue in determining that the district court had jurisdiction to decide the case and to issue the preliminary injunction.

2. *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. OHSAA*.

In *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. OHSAA*, 647 F.2d 651 (6th Cir. 1981), two female students at Yellow Springs tried out for and made the boys' basketball team. They were not, however, permitted to participate in interscholastic competition because OHSAA barred interscholastic competition in coeducational basketball. Yellow Springs did not have a girls' basketball team at the time, and it sued OHSAA to invalidate the ban on coeducational basketball. The action was based on both statutory claims under Title IX, 20 U.S.C. §§1681 *et seq.*, and constitutional claims under §1983. The district court held that OHSAA operated under color of state law,

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[3] In finding that the Minnesota State High School League, an organization comparable to the MHSAA (and to TSSAA), acted under the color of state law and that a §1983 action was therefore "properly before a federal court to determine if the High School League's actions" comported with equal protection, the Eighth Circuit in *Brenden* cited and relied on *Morris* among other cases to support that state action conclusion. 477 F.2d at 1299.

explaining the nature of OHSAA's role, its composition, and the "entanglement, both actual and perceived, between individual schools and the OHSAA." *Id.* at 653.

On appeal, the Sixth Circuit approved the district court's state action holding: "The OHSAA's character as a semi-official in its activities and its symbiotic relationship with the state ... lead to the conclusion that the trial judge correctly found state action." *Id.* The concurrence "concur[red] with the majority's holding on state action." *Id.* at 661. On the merits, the Court of Appeals held that the OHSAA rule violated Title IX; however, it declined to reach the substantive merits of the constitutional claim against the OHSAA rule because the finding of a statutory violation made it "unnecessary to decide whether the [OHSAA] rule also violates the fourteenth amendment." *Id.* at 656 n.3.

3. *Alerding v. OHSAA*.

In *Alerding v. OHSAA*, 779 F.2d 315 (6th Cir. 1985), nonresident students challenged on constitutional grounds under §1983 an OHSAA rule that barred nonresident students from participating in Ohio interscholastic sports. The district court in *Alerding* noted that the "first hurdle plaintiffs must clear in order to succeed on their claim under 42 U.S.C. §1983 is to demonstrate that the action complained of is fairly attributable to the state." 591 F. Supp. 1538, 1540 (S.D. Ohio 1984). In the absence of state action, the district court would have no jurisdiction to adjudicate a §1983 action.

The district court held that the state action obstacle was "of little hindrance here as the Sixth Circuit has ruled that the OHSAA acts under color of state law for the purposes of organizing and regulating Ohio high school interscholastic athletics." *Id.* The district court in *Alerding* expressly and exclusively relied on the Sixth Circuit's previous decision in *Yellow Springs* for that proposition, which was an essential part of the court's §1983 analysis. *Id.* For the district court in *Alerding*, the state action analysis in

Yellow Springs was deemed binding precedent regarding the state action status of the OHSAA, the very same association involved in the *Yellow Springs* decision.

On appeal, the Sixth Circuit expressly affirmed the state action holding of the district court: "OHSAA is a state actor for purposes of §1983 because Ohio has implicitly delegated to OHSAA its power to regulate and organize interscholastic athletic activities." 779 F.2d at 316 n.1. Because OHSAA acted under the color of state law, "[t]he district court's jurisdiction was ... proper." *Id.* at n.2. As was the case with the district court, the Court of Appeals expressly and exclusively cited and relied on *Yellow Springs* as controlling authority on the state action issue. Resolution of the issue was deemed self-evident, so no extended analysis was necessary.

Thus, prior to *Tarkanian* and *Burrows*, the Sixth Circuit had twice found OHSAA to be a state actor, and it had, at least implicitly, found MHSAA, OHSAA's Michigan counterpart, to be a state actor. In this regard, the Sixth Circuit was in line with uniform precedent from other circuits on the state action issue regarding the regulatory conduct of high school athletic associations.

B. The *Burrows* Decision

Burrows was a constitutional challenge to a rule promulgated by OHSAA. In the district court, the parties "stipulate[d] that OHSAA's by-laws ... constituted state action." *Burrows v. OHSAA*, 891 F.2d 122, 125 (6th Cir. 1989). This stipulation was understandable in light of the Sixth Circuit's earlier decisions in *Yellow Springs* and *Alerding*, which had held that OHSAA was a state actor. Despite the stipulation, the panel in *Burrows*, apparently *sua sponte*, undertook to determine *de novo* and without a record whether OHSAA's regulatory conduct constituted state action. Contrary to the rulings in *Yellow Springs* and *Alerding*, the court in *Burrows* found OHSAA not to be a state actor.

As the panel below acknowledged, *Burrows* does not cite or even mention *Morris*, *Yellow Springs* or *Alerding*, even though *Yellow Springs* and *Alerding*, at least, involved the state action status of the same association. Petition for Writ of Certiorari, at 14-A, 2-C. Further, *Burrows* did not mention or cite this Court's decision the previous year in *Tarkanian*. Consequently, *Burrows* could not and did not deal with or distinguish the crucial analysis in footnote 13 of *Tarkanian*. Finally, *Burrows* fails to recognize the adverse and uniform precedent on the state action issue from other circuits.

In their BIO, Respondents assert that, with *Burrows*, the Sixth Circuit is the one circuit that analyzes and does not simply assume the state action status of the regulatory conduct of high school athletic associations such as TSSAA. BIO, at 8-9. In light of the provenance of *Burrows*, and its total disregard of controlling circuit and Supreme Court precedent on the issue, this claim is risible. *Burrows* created a circuit split and disregarded controlling precedent of this Court (*Tarkanian*) unwittingly – out of ignorance of precedent rather than out of reflective consideration of those authorities. Apparently, the state action issue had not been briefed by the parties, which had stipulated to the existence of state action in the district court.

The decision below in the instant case exacerbates the problem. The Sixth Circuit's reasoning relies on *Burrows* even though the Court of Appeals recognizes that *Burrows* did not consider relevant circuit precedent or this Court's decision in *Tarkanian*. By relying on *Burrows*, the court below does not consider decisions from other circuits and does not directly confront its creation of a split in circuits:

> [O]ur panel's holding that TSSAA is not a 'state actor' contradicts the uniform case law in the field from other circuits.... In addition, all of the several state supreme courts which have addressed the question have held that their high school interscholastic athletic associations are state actors. I find no circuit or state supreme court decision

supporting our court's cramped view of state action, and our panel's opinion does not recognize or discuss these authorities from other courts." Petition for Writ of Certiorari at 3-4-C (Merritt, J., dissenting from denial of rehearing *en banc*).

The panel decision below purports to deal with this Court's footnote 13 in *Tarkanian*. Petition for Writ of Certiorari, at 16-17-A. However, for the reasons so meticulously explained by the district court in *Communities for Equity* and outlined in the Petition for Writ of Certiorari (at 21-25), the Court of Appeals' treatment of footnote 13 in *Tarkanian* is analytically wanting. Indeed, it is so erroneous that the district court in *Communities for Equity* took the extraordinary measure of refusing to follow it, even though the decisions of the Court of Appeals for the Sixth Circuit are binding on the Michigan district court.

The district court in *Communities for Equity* believed (correctly) that it confronted a conflict between its fealty to the decisions of this Court and its obligation to follow the decisions of the Sixth Circuit. "Footnote 13 of the *Tarkanian* decision indicates that the Supreme Court believes that state athletic associations, such as MHSAA [and TSSAA] are state actors." 2000 U.S. Dist. LEXIS 574 at *42. But the Sixth Circuit's decision in *Brentwood Academy* had held otherwise, fundamentally misconstruing footnote 13 in *Tarkanian*. In the end, the district court concluded that it had a higher obligation to follow decisions of this Court. Therefore, faced with an "analysis [that] misapplies the reasoning in *Tarkanian*," *id.* at *37, and one that suffered from a "serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*," *id.* at *41, the district court in *Communities for Equity* concluded that the *Brentwood Academy* decision was "not controlling." *Id.*

Under the circumstances, a line of precedent whose provenance is so questionable and whose subsequent attempt at reconciliation with controlling precedent of this Court is so unpersuasive as to spawn a form of judicial nullification cannot be allowed to stand. If this Court chooses not to grant

certiorari, it should restore judicial integrity to this issue by summarily reversing the decision of the Sixth Circuit below.

CONCLUSION

Petitioner continues to believe that this case is certworthy and that this Court should grant review to give plenary consideration to the important state action issues that it raises. However, if the Court decides not to grant certiorari, it should grant this Motion for Summary Reversal to restore judicial integrity to the precedents of this Court and to maintain the integrity of settled doctrine established by this Court in *Tarkanian,* 488 U.S. 179, 198 n.13 (1988), and followed without exception by all other appellate courts to address the issue.

Respectfully submitted,

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APPENDIX A

COMMUNITIES FOR EQUITY, et al., Plaintiffs, v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, et al., Defendants.

Case No. 1:98-CV-479

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2000 U.S. Dist. LEXIS 574

January 21, 2000, Decided

DISPOSITION: [*1] Defendants' motions for summary judgment denied.

COUNSEL: For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit, Grand Rapids, MI.

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For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Kristen Galles, Equity Legal, Alexandria, VA.

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UNITED STATES OF AMERICA, amicus: Charles R. Gross, U.S. Attorney's Office, Grand Rapids, MI.

JUDGES: RICHARD ALAN ENSLEN, Chief Judge.

OPINION BY: RICHARD ALAN ENSLEN

OPINION:
Introduction [*2]

On June 26, 1998, Plaintiffs, consisting of the parents of two female student-athletes and an organization named Communities for Equity ("CFE"), filed a class action lawsuit alleging that the Michigan High School Athletic Association ("MHSAA") discriminated against female athletes. Plaintiffs allege that the discrimination took a variety of forms including: (1) providing more participation opportunities to boys than girls; (2) requiring girls to play in "non-traditional" seasons; (3) operating shorter seasons for girls than boys; (4) scheduling female athletes to compete on less desirable dates than their male counterparts; (5) providing inferior athletic facilities for girls athletic tournaments in comparison to boys athletic tournaments; (6) requiring girls to play in some sports under rules that differ from the rules of the National Collegiate Athletic Association ("NCAA"); and (7) allocating more resources to support and promote boys athletic programs.[1]

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[1]Plaintiffs filed an Amended Complaint on July 27, 1998.

[*3]

At this point in the litigation, Plaintiffs assert claims against the MHSAA and the individual members of the MHSAA Representative Council in their official capacity. Claims One and Two arise under Title IX of the Education Amendments of 1972, *20 U.S.C. §§ 1681* et seq., ("Title IX"). Claim Three arises under the Equal Protection Clause of the Fourteenth Amendment pursuant to *42 U.S.C. § 1983.* Claims Four and Five arise under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.3101 et. seq. Plaintiffs seek declaratory, injunctive and monetary relief.

There are three motions currently before the Court. The first motion is Defendants' Renewed Motion for Summary Judgment for Lack of Standing. The second is the Individual Defendants' Renewed Motion for Summary Judgment. The third is Defendant MHSAA's Supplemental Motion for Summary Judgment Pursuant to FRCP 56(c) as to the First and Second Claim of Plaintiffs and Motion Pursuant to FRCP 12(b)(6) as to Plaintiffs' Third Claim of Relief.

These motions raise four distinct issues. First, are Defendants properly subject to Title IX's requirements if they do not receive federal [*4] financial assistance? Second, are Defendants "state actors?" Third, do Plaintiffs have standing to sue? Fourth, even if Defendant MHSAA is subject to Title IX, may the Individual Defendants be sued in their official capacities?

Discussion

Summary judgment requires that the Court determine whether the Plaintiffs have presented enough evidence so that a jury could reasonably find for them. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Lapointe v. UAW, Local 600, 8 F.3d 376, 378 (6th Cir. 1993).* Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson, 477 U.S. at 255.* In addition, when considering a summary judgment motion, the evidence of the non-movant is to be believed and [*5] all justifiable inferences are to be drawn in his favor. *Adickes v. Kress, 398 U.S. 144, 158-159, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1966).*

I. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). A "program or activity" includes "all the operations of ... a college, university, or other post-secondary institution, or a public system of higher education .. any part of which is extended Federal financial assistance." *20 U.S.C. § 1687*(2)(A).

In most Title IX cases, the plaintiff attempts to demonstrate that the defendant is either a direct or indirect recipient of federal funds. See generally *Smith v. NCAA, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986); Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984).* [*6] In this case,

however, there is no evidence that the MHSAA is either a direct or indirect recipient of federal funds. First, the MHSAA does not receive any direct assistance from the federal government. Second, the MHSAA receives the bulk of its funding from gate receipts generated at MHSAA-sponsored tournaments. Based upon this evidence, the MHSAA is neither a direct nor indirect recipient of federal funds. See generally *Smith, 119 S. Ct. at 929-930* (holding that NCAA was not an indirect recipient of federal funds even though it received dues from schools that received federal funds); *Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994)* (holding that Kentucky High School Athletic Association was an indirect recipient of federal funds because it was created by state law, its functions were determined by the Kentucky Board of Education, and it received dues from member schools who received federal funds); *Yellow Springs, etc. v. Ohio High Sch. Ath. Ass'n, 647 F.2d 651 (6th Cir. 1981)* (holding that Ohio High School Athletic Association was not a recipient of federal funds because it did not receive direct federal [*7] assistance, and it did not receive money from local schools who were recipients of federal assistance).

Although this might ordinarily end the Court's inquiry and justify a decision to grant Defendants' Motion for Summary Judgment, both Plaintiffs and the United States as amicus curiae argue that even though the MHSAA is not a federal aid recipient, it is nonetheless subject to Title IX. The premise of this argument is that because local Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded activity and should be subject to Title IX. This precise issue was left unresolved by the recent Supreme Court decision in Smith which explicitly declined to consider whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling

entity is covered by Title IX regardless [of] whether it is itself a recipient." *119 S. Ct. at 930.*

Given that the Supreme Court has left this issue unresolved, the Court believes that it must analyze two questions to resolve Defendants' motions [*8] relating to Title IX. First, as a matter of law, is the exercise of controlling authority over a federally funded program sufficient to trigger Title IX? Second, is there a genuine issue of material fact as to whether local Michigan school districts have ceded controlling authority over interscholastic athletics to the MHSAA, such that the MHSAA effectively controls those athletic programs? Each of these issues will be addressed in turn.

A. Legal Question

Turning first to the legal question, few courts have considered whether exercising "controlling authority" over a federally funded activity is sufficient to subject an entity to Title IX. See generally *Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D.Pa. 1999)* (holding, in part, that the NCAA was subject to Title IX because it exercised controlling authority over athletic programs receiving federal financial assistance) rev'd *Cureton v. NCAA, 198 F.3d 107, 1999 WL 1241077 (3rd. Cir. 1999)* (holding that the NCAA did not exercise "controlling authority" over school athletic programs). See also *Kemether v. Penn. Interscholastic Athletic Assoc., 1999 U.S. Dist. LEXIS 17326, 1999 WL 1012948* (E.D.Pa. Nov. 8, 1999) (holding that Title [*9] IX subjects state athletic association to suit under the theory that association controls athletic programs receiving federal aid). For the reasons stated below, the Court does not find the reasoning in these non-controlling cases to be persuasive.

This Court's analysis begins with *Cannon v. University of Chicago, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946*

(1979). In Cannon, the Supreme Court was asked to determine whether Title IX implied a private right of action. In deciding this question, the Supreme Court engaged in an analysis of the history, subject matter, and purpose of Title IX. That analysis led the Supreme Court to two related conclusions. First, the Supreme Court concluded that the wording and purpose of Title IX indicated that it was enacted for the benefit of a particular class of people - those discriminated against on the basis of sex. *Id. at 689-91*. In reaching this conclusion, the Supreme Court explicitly rejected the proposition that Title IX was enacted "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory [*10] practices." *Id. at 691-92*. Second, the Supreme Court recognized that Title IX "sought to accomplish two related, but nevertheless somewhat different objectives... Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Id. at 704*. In reaching this conclusion, the Supreme Court explained that a private right of action, in contrast to a suit brought by the federal government, was "fully consistent with - and in some cases even necessary to - the orderly enforcement of the statute." *Id. at 705-06*. Based upon this analysis, the Supreme Court concluded that Title IX implied a private cause of action.

Based in large part upon the Supreme Court's understanding of Title IX in Cannon, this Court is convinced that any entity which has controlling authority over a "program or activity receiving Federal financial assistance" is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds which finance the program or activity. In reaching this [*11] conclusion, the Court rejects Defendants' argument that only recipients of federal funds are

subject to Title IX because this interpretation is at odds with the plain meaning and purpose of the statute.

To begin with, Section 902 of Title IX does not, on its face, confine the list of potential defendants to "recipients" of federal funds. Instead, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." *20 U.S.C. § 1681*(a). While the most likely entity subject to this prohibition would be a school district that is a recipient of federal aid, there is nothing in the statute which limits the class of potential defendants to such recipients. Instead, the statute prohibits discrimination, presumably by anyone, "under any education program or activity receiving Federal financial assistance." Id.

This interpretation of the statute is supported by the Supreme Court's analysis in Cannon. In that case, the Supreme Court made it clear that Title IX did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of [*12] sex in the operation of programs receiving federal aid. See Cannon, 441 U.S. £ 691-92. Defendants ask the Court to interpret Title IX as only applying to recipients of federal funds, but this is precisely the interpretation of Title IX that the Supreme Court seemed to reject in Cannon. Id.

Not only is Defendants' suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the Cannon decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal

funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Although the [*13] Court concludes that exercising "controlling authority" is sufficient to subject an entity to liability under Title IX, it must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a "recipient" of federal money. See *Grove City College v. Bell, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984)* (examining whether Grove City College was a recipient of federal financial assistance in order to determine whether it was subject to Title IX); *Dept. of Transp. v. Paralyzed Veterans, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986)* (stating that Congress limited the scope of § 504 of the Rehabilitation Act -- a statute with similar wording and history to Title IX -- to cover only entities that receive federal financial assistance); *Horner v. Kentucky High Sch. Ath. Ass'n, 43 F.3d 265 (6th Cir. 1994)* (examining extent to which Kentucky High School Athletic Association ("KHSAA") could be considered a recipient of federal financial assistance in order to determine whether it was subject to Title IX).[2]

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[2]As noted earlier, Section 902 of Title IX *(20 U.S.C. § 1681*(a)) does not use the term "recipient," although it does reference programs that "receive" federal funds. The Court suggests that one reason that courts have focused on "recipients" of federal funds is because entities that receive federal financial assistance will almost always be in control of those funds. Therefore, in the normal case, there is no need to inquire into who "controls" the funds. It is only in the rarest of cases, such as this one, where the entity that controls the federal funds and the entity that receives the federal funds are different, that the issue of control becomes important.

While the Court is mindful of these three decisions, it concludes that they are not conclusive on the issue currently before the Court. The Court reaches this conclusion for three reasons.

First, none of these cases explicitly considered the "controlling authority" rationale. Therefore, while these cases focused on whether certain defendants were appropriately considered recipients of federal funds, these cases did not explicitly hold that only recipients could be Title IX defendants. See *Smith, 119 S. Ct. at 929-930* (implying that the "controlling authority" theory of Title IX liability has not been addressed by the Supreme Court).

Second, the holdings in all three of these cases are logically consistent with the "controlling authority" theory of liability. See *Grove City, 465 U.S. at 563-570* (finding that Grove City College was a proper defendant under Title IX where it had obvious control over its own financial aid program which was funded, in part, by federal grants); *Paralyzed Veterans, 477 U.S. at 604-611* (finding that air carriers were not subject to Title IX where they had no control over program which developed airports [*15] and received federal aid); *Horner, 43 F.3d at 272* (finding that KHSAA was properly sued under Title IX where it had control over interscholastic athletic programs that were receiving federal financial assistance).

Third, the case which goes the furthest in implying that only recipients of federal funds may be subject to Title IX, Paralyzed Veterans, is inconsistent with the Supreme Court's explicit analysis in Cannon. In Paralyzed Veterans, the Supreme Court held that § 504 of the Rehabilitation Act only applied to recipients of federal funds, noted that § 504 and Title IX were similar statutes, and thereby implied that Title IX's requirements were similarly limited to recipients of federal aid.

See *Paralyzed Veterans, 477 U.S. at 605-606.* This implication, however, is at odds with the Supreme Court's analysis in Cannon that Title IX does more than simply prevent recipients of federal funds from discriminating on the basis of sex. See *Cannon 441 U.S. at 691-92, 704-06.* Therefore, whatever implication arises out of Paralyzed Veterans is trumped by the Supreme Court's explicit analysis in Cannon.

Therefore, [*16] because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds, because the Cannon decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to merely stopping recipients of federal resources from discriminating), because the precedent of the Supreme Court and the Sixth Circuit is consistent with the "controlling authority" theory of liability, and because holding otherwise would be nothing more than empty formalism, the Court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.

B. Factual Question

Having concluded that "controlling authority" is a valid basis for Title IX liability, the Court turns to whether Plaintiffs have offered sufficient evidence that the MHSAA possesses the necessary authority to create a genuine issue of material fact. In order to sustain this burden, Plaintiffs point to a variety of factors. First, they point out that local school districts receive federal funds and therefore [*17] those districts' athletic programs are "programs or activities receiving Federal financial assistance . . .." See *20 U.S.C. § 1687*(2)(A). Second, they note that the MHSAA's stated purpose is "to create, establish and provide for, supervise and conduct interscholastic programs

throughout the state." Third, they argue that MHSAA promulgates rules and decisions that influence virtually every aspect of interscholastic athletics. Specifically, they point to: MHSAA's eligibility requirements, MHSAA's rules governing contests, MHSAA's rules relating to coaches, MHSAA's rules relating to the training of officials, MHSAA's decisions about the seasons in which certain sports will be played, MHSAA's rules relating to the number of practices that are allowed, and MHSAA's control over postseason competitions. In light of the fact that virtually every high school in Michigan is a member of MHSAA, each school agrees to be bound by the rules of MHSAA, and the MHSAA can impose sanctions on schools that violate its rules, the Plaintiffs argue that schools have ceded controlling authority over interscholastic athletics to the MHSAA.

In response, Defendants argue that MHSAA [*18] receives no money from its member schools either directly or indirectly. Furthermore, they point out that Michigan law vests a non-delegable duty to regulate interscholastic athletics in local school boards. More specifically, they counter Plaintiffs' assertion that local schools have ceded control over interscholastic athletics with the following facts: individual schools are solely responsible for decisions about what teams to sponsor, MHSAA rules must be formally adopted by local school districts, these districts are primarily responsible for enforcement, membership in MHSAA is voluntary, and local school districts often make and enforce rules that are more stringent than MHSAA rules. From Defendants' perspective, the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator. Defendants argue that the MHSAA simply provides member schools with a set of rules, which the member schools suggest and must formally adopt, so that a uniform set of rules can be obtained.

Essentially, Plaintiffs and Defendants disagree about what it means to "cede controlling authority." Plaintiffs assert that because the MHSAA makes the [*19] rules, it has controlling authority over interscholastic athletics -- even though the local school districts must formally ratify those rules. Defendants argue that MHSAA cannot have controlling authority over interscholastic athletics because a school district is only bound by MHSAA rules if that school district formally adopts those rules.

To resolve this disagreement, the Court begins with a review of the MHSAA and its historic role in interscholastic athletics. In 1924, the MHSAA was founded to "exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." 1978-90 MHSAA Handbook, Foreword. Prior to 1965, the Superintendent of Public Instruction was given supervision and control over interscholastic athletics by statute. See *School Code of 1955, 1955 PA 269* § 784. Then, in 1965, this authority was transferred to the State Board of Education via statute. Mich. Comp. Laws § 388.1014. From 1924 through 1974 the MHSAA appears to have been part of the state government, assisting either the Superintendent of Public Instruction or the State Board of Education in regulating [*20] interscholastic athletics.

In 1972, the Michigan legislature transferred authority over interscholastic athletics from the State Board of Education to the local school boards. In addition to transferring authority over interscholastic athletics in this manner, the Michigan legislature provided that:

The [MHSAA] is the official association of the state for the purpose of organizing and conducting athletic events, contests, and tournaments among schools and shall be responsible for the adoption and enforcement of rules relative to eligibility of

athletes in schools for participation in interschool athletic events, contests and tournaments.

Id. at § 380.1292(2). In addition to this "official designation," a representative of the State Board of Education was required to be a member of the MHSAA governing body. Id. at § 380.1292(1). In 1972, the MHSAA incorporated as a private association.

In 1995, the Michigan legislature again amended the statute. This time it removed MHSAA's official designation but explicitly provided that local school districts could "join organizations as part of performing the function of the school district." Id. at § 380.11a(4). [*21] While the MHSAA's public or private status may have changed throughout the years, its basic function appears to have remained the same since its inception in 1924 -- create rules and policies for the regulation of interscholastic athletics in the state of Michigan.

Against this historical backdrop, the Court's analysis of the extent to which the MHSAA currently exercises control over interscholastic athletics begins with a review of the "MHSAA Handbook For 1999-2000 School Year" (Handbook). The forward to the Handbook provides, "the Michigan High School Athletic Association, Inc. is a private, voluntary association of public, private and parochial secondary schools . . .it is not necessary for any school to join the MHSAA in order to conduct a program of competitive athletics, and MHSAA member schools are not prohibited from engaging in competition against non-member schools . . . MHSAA is a self-supporting organization that does not rely on taxpayer dollars from any agency of the state or federal government. Schools do not pay membership dues, tournament entry fees, or service fees. When schools host MHSAA events they are reimbursed their itemized expenses and usually generate additional [*22] income from concession and program sales, parking fees, and

a portion of gate receipts. . .." Forward, MHSAA Constitution. The MHSAA Constitution goes on to provide that, "all high schools, junior high/middle schools, or other schools of Michigan . . . may become members of this organization . . .." Art. II, MHSAA Constitution. These provisions confirm Defendants' assertion that MHSAA is a private organization and that membership is purely voluntary. As such, these provisions go a long way in assuring the Court that the MHSAA does not exercise controlling authority over interscholastic athletics because the local schools can presumably disregard MHSAA rules, or exercise their option not to join the MHSAA, whenever they choose.

However, as the Court reads the MHSAA Handbook more closely, its initial assessment of the benign relationship between the MHSAA and local school districts is called into question. In the same forward that promises individual school districts that their membership in MHSAA is purely voluntary, MHSAA writes, " . . . schools adopt the Regulations and Interpretations of this Handbook as their own and agree to be primarily responsible for their enforcement. [*23] " (emphasis in original). This warning is then reiterated by the MHSAA Constitution which provides,

for a school to become a member of this organization, its board of education/governing body must complete the annual Membership Resolution stating that the board of education/governing body has adopted the organization's rules as its own and agrees to primary enforcement of such rules as to its own schools. Failure to implement required effects of policies and procedures promulgated by the organization to govern eligibility, competition and tournaments shall require that members of the administration and board of education/governing body appear before the [MHSAA] to show cause why the school is not in violation of the terms of its Membership Resolution.

Art. II, MHSAA Constitution. These provisions run contrary to the permissive and voluntary tone of the previously cited provisions and demand a closer examination of the relationship between the MHSAA and local school districts.

To uncover the precise nature of this relationship, it is necessary to examine the duties assigned to the Representative Council, the governing body of the MHSAA. The MHSAA Constitution provides: [*24]

Article VI -- Duties of the Council

Sec. 1. The Council shall have general control of interscholastic athletic policies.

Sec. 2. It shall make rules of eligibility for players.

Sec. 3. It shall make regulations for the conduct of interscholastic contests.

Sec. 4. It shall be the annual responsibility of the Council to ascertain that the Council elective process has provided for representation of females and minorities. If, in the judgment of the Council, these results have not been achieved, said Council shall not appoint not to exceed four Representative Council members-at-large for two-year terms.

Sec. 5. It may discipline member schools and contest officials for violations of rules and regulations

Sec. 6. It shall provide for the hearing of appeals from decisions of the Executive Director Sec. 7. It shall exercise all other functions necessary for carrying out the spirit and purpose of the Constitution.

Art. VI, MHSAA Constitution. Not only is the Representative Council given broad authority to regulate interscholastic athletics, a separate Due Process Procedure provides a complex process which governs "the investigation into alleged or contested violations [*25] by a party of the Constitution, By-Laws, regulations, rules, or interpretations of the MHSAA."

The Regulations provide lengthy eligibility requirements, limitations on the number of games that may be played, specifications of what type of officials may be used, rules for playing MHSAA sports, practice and scrimmage schedules, limitations on the number of games in which an athlete may participate in a given week, day, month, etc, maximum number of competitions allowable in a given year, a list of sanctions for a wide variety of violations, and a calendar of MHSAA sponsored state tournaments. These Regulations cover 51 pages of the Handbook.

A comprehensive review of the Handbook undercuts Defendants' assertion that MHSAA has no real control over interscholastic athletics. Defendants may be correct, as a technical matter, that the local schools must formally adopt MHSAA rules and enforce MHSAA policies, but this does not necessarily mean that MHSAA does not have control over those rules or policies. There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. [*26] This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

This explains why Defendants' reliance, on statements by the Michigan Attorney General and several state courts that

interscholastic sports is a "non-delegable" duty of the local school districts, is misplaced. While the regulation of interscholastic athletics under Michigan state law is "non-delegable," the local school districts have delegated it to the Defendants. Having delegated this duty, the local school districts have now lost the power to control [*27] interscholastic athletics independent from the MHSAA.

The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics. Thus, summary judgment must be denied.[3]

> The Court believes that the potential inability to hold anyone accountable for alleged discrimination in a program receiving federal financial assistance is precisely why the ceding "controlling authority" is consistent with the purpose of Title IX. Without liability for those who control federal programs, such as interscholastic athletics, victims of discrimination are placed in an untenable dilemma clearly at odds with the spirit, purpose, and language of Title IX. On the one hand, these victims may seek a remedy from the athletic association, but that association will respond that it only makes "suggestions" to the local school districts, and that the local school districts have the real power to adopt and enforce policies and rules. On the other hand, these victims might go to the local school districts to address their problems, but these districts will respond that they are

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[3]The Court notes that the relief which the Plaintiffs seek cannot be obtained by suing the school districts directly. This is because the local school districts cannot unilaterally alter any policies of the MHSAA that are discriminatory. Assuming Plaintiffs allegations are true, the only way a local school districts could avoid whatever discrimination emanates from MHSAA policies would be to withdraw from the MHSAA. While this might end the discrimination, it would do so by depriving Plaintiffs of the ability to participate in interscholastic sports at all.

powerless to change the policies of the MHSAA on their own, and that the MHSAA holds all the real power over interscholastic athletics.

[*28]

II. EQUAL PROTECTION AND *42 U.S.C. § 1983*

Defendants also ask this Court to grant summary judgment in their favor with respect to Plaintiffs' *42 U.S.C. § 1983* claim. Defendants argue that the MHSAA is not a state actor and therefore cannot be liable under § 1983. Plaintiffs respond that the symbiotic relationship between the state of Michigan and the MHSAA is so pronounced that the MHSAA should be considered a state actor.

In the Sixth Circuit, "the principal inquiry in determining whether a private party is a "state actor" is whether the party's actions may be 'fairly attributable to the state.'" *Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992)* citing *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).* The Supreme Court has created three tests to assist courts in making this determination. First, the public function test. See *West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988).* Second, the state compulsion test. *Adickes. v. S.H. Kress & Co., 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).* [*29] Third, the symbiotic relationship or nexus test. *Burton v. Wilmington Parking Auth., 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961).* The Supreme Court has suggested that these tests may be simply "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court [when resolving state actor questions]." *Lugar, 457 U.S. at 939.*

The public function test asks whether "the private entity exercises powers which are traditionally exclusively reserved

to the state, such as holding elections, or eminent domain." *Wolotosky, 960 F.2d at 1335.* Although the United States, as amicus, argues that interscholastic sports in Michigan is a public function, this position is contradicted by the Sixth Circuit's analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758, 763 (6th Cir. 1999).* In that case, the Sixth Circuit concluded, based upon the Supreme Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 545, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987),* that interscholastic sports is not a power traditionally [*30] reserved to the state. Id. While this Court agrees with the United States that the State of Michigan has a long history of regulating interscholastic athletics (see I, B above), and that many of the cases and Michigan Attorney General opinions which Defendants cite indicate that interscholastic athletics is a "traditional government function," the Sixth Circuit's analysis in Brentwood is controlling.

The state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state. *Wolotsky, 960 F.2d at 1335.* The Court believes that the MHSAA is a state actor pursuant to this test. The most persuasive argument supporting this conclusion is made by Defendants, albeit in the context of Title IX, where they argue that interscholastic athletics is a "non-delegable" duty of local school districts. According to Defendants, because all power over interscholastic athletics is held by the local districts, the MHSAA only acts at the will and direction of those districts. This characterization [*31] of the MHSAA-local school district relationship, added to the fact that the MHSAA is governed by a Representative Council comprised of primarily state employees (16 of the Representative Council members are public school employees and the Superintendent of Instruction

is an ex-officio member), combines to make a strong case that the MHSAA is a state actor pursuant to the state compulsion test.

While satisfaction of the state compulsion test is reason enough to conclude that the MHSAA is a state actor, the Court is even more convinced by application of the symbiotic relationship test. As the Sixth Circuit explained, "under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky, 960 F.2d at 1335.*

There is no denying that there is a unique and close relationship between the MHSAA and the State of Michigan. Among other factors which define this relationship, the MHSAA is made up of primarily public schools,[4] public school employees [*32] are elected to serve on the Representative Council which oversees the MHSAA, school employees who desire to serve on the Representative Council must have approval from their principal or school district superintendent, the Michigan Superintendent of Public Instruction is an ex-officio member of the Representative Council, the MHSAA exercises tremendous influence and control over the rules and policies that regulate interscholastic athletics, MHSAA rules and policies are binding on all schools unless they withdraw from the MHSAA, and local school districts are primarily responsible for enforcing MHSAA rules and policies. Based upon similar factual circumstances linking state athletic associations to the state, a variety of Circuit Courts have found that these associations are state actors. See *Griffin High School v. Illinois High School Athletic Ass'n, 822 F.2d 671, 674 (7th*

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[4]In the 1998-1999 school year, the MHSAA was comprised of 617 public high schools and 114 private schools.

Cir. 1987); In Re: *United States ex. rel. Missouri State High School Activities Ass'n, 682 F.2d 147, 151 (8th Cir. 1982); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982); Moreland v. Western Pennsylvania Interscholastic Athletic League, 572 F.2d 121, 125 (3rd Cir. 1978);* [*33] *Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224, 227 (5th Cir. 1968); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269, 273 (10th Cir. 1963).* If this were the only precedent on the issue, the Court would be hard-pressed to justify any conclusion other than that the MHSAA is a state actor. [5] However, before the Court reaches this conclusion, there are two reported decisions which demand close attention.

[*34]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association, 180 F.3d 758 (6th Cir. 1999),* the Sixth Circuit was asked to decide whether the Tennessee Secondary Athletic Association ("TSSAA") was a state actor when it enforced a rule against a private school, Brentwood Academy,

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[5]Defendants' argument that it is not a state actor, because it receives no state funds, is similar to its Title IX argument in that both ask the Court to exalt from over substance. The Supreme Court has repeatedly found, however, that when determining whether a private entity is a "state actor," courts should engage in a factual and pragmatic inquiry as opposed to an overly formalistic mode of analysis. See *Lugar, 457 U.S. at 939; Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953)* (rejecting formalistic application of the Fifteenth Amendment and holding that Jaybird Political Party was a state actor on the grounds that the Jaybird primary had the practical effect of determining who would win the general election and the party was created for the sole purpose of avoiding the Fifteenth Amendment and discriminating against blacks); *Smith v. Allwright, 321 U.S. 649, 661, 88 L. Ed. 987, 64 S. Ct. 757 (1944)* (holding that Texas Democratic Party was subject to the Fourteenth Amendment as a state actor and rejecting as a "slight . . .change in form" defendants' argument that because the Democratic Party was a private entity it was not a state actor).

that prohibited the school from using undue influence in recruiting student-athletes. The Sixth Circuit began by analyzing the structure and function of TSSAA which is strikingly similar to the MHSAA in this case.[6] The Sixth Circuit noted that: (1) the TSSAA was a voluntary organization, that authorized member schools to withdraw at any time; (2) the TSSAA was made up of public and private schools; (3) a Board of Control, made up of nine members elected from member schools, decided TSSAA policy; (4) at all relevant times the Board of Control was comprised of public high school administrators; (5) the TSSAA receives no state funding; (6) the TSSAA's revenue was generated from gate receipts at state tournaments and the TSSAA negotiated contracts with member schools for the use of their facilities to house these tournaments; and (7) while a Tennessee Board of Education rule at one [*35] time designated the TSSAA to conduct interscholastic athletics, this rule was repealed in 1995.

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[6]There are only minor differences between the TSSAA and the MHSAA. First, whereas the TSSAA had nine members on the governing board, the MHSAA has 18. Second, whereas all members of the TSSAA Control Board were public school employees during the relevant time period, 16 of the 18 members of the MHSAA Representative Council were public school employees. Third and finally, whereas the TSSAA was "designated" by the Tennessee Board of Education to conduct interscholastic athletics until 1995, the MHSAA was statutory authorized to oversee interscholastic athletics until 1995 at which time Michigan state law was amended.

With these facts in mind, the court examined prior Sixth Circuit precedent and concluded that Brentwood Academy had failed to satisfy any of the three tests for determining when a private entity should be considered a state actor. In reaching this conclusion, the Sixth Circuit examined several of its prior [*36] decisions that had held that a state athletic association was a state actor. See *Yellow Springs v. Ohio High School Athletic Association, 647 F.2d 651 (6th Cir. 1981); Aldering v. Ohio High School Athletic Association, 779 F.2d 315 (6th Cir. 1985).* The Sixth Circuit concluded that these decisions were not controlling. *Brentwood Academy, 180 F.3d at 764-766.*

Additionally, the Sixth Circuit examined the extent to which a finding that TSSAA was not a state actor was consistent with Footnote 13 of the Supreme Court's decision in *NCAA v. Tarkanian, 488 U.S. 179, 193 n.13, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988).* The Sixth Circuit explained that while Tarkanian Footnote 13 indicated that high school athletic associations might potentially be state actors in relation to public schools, the same footnote indicates that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* Therefore, the Sixth Circuit concluded that because [*37] Brentwood Academy was a private school, Footnote 13 did not require a finding that the TSSAA was a state actor. *Brentwood Academy, 180 F.3d at 766.*

This analysis misapplies the reasoning in Tarkanian. In Tarkanian, the Supreme Court was asked to decide whether the National Collegiate Athletic Association ("NCAA") was acting under color of state law when it conducted an investigation into athletic programs at the University of Nevada Las Vegas ("UNLV") and recommended to UNLV that it discipline its mens basketball coach, Jerry Tarkanian. In a 5-4 decision, the Supreme Court concluded that the NCAA was not a state actor.

The central issue in the case was whether the NCAA's recommendations, and UNLV's adverse employment actions, were so coordinated that they should be considered "joint actions" such that the NCAA was a state actor. *Tarkanian, 488 U.S. at 194-199.* Before analyzing this "joint action" issue, however, the majority opinion briefly examined whether UNLV exercised such control over the NCAA that all NCAA policies and actions were transformed into state actions. *Id. at 193.* The majority observed that the NCAA was made [*38]

up of colleges and universities from all across the country, and that UNLV had no more influence over the NCAA than other schools. Id. Therefore, because these colleges and universities outside of Nevada were not acting under color of Nevada state law, the NCAA's decisions and policies could not possibly be considered to be those of the state of Nevada. Id.

At this point, the majority inserted Footnote 13. *Id. at 193 n. 13.* The first sentence of the Footnote points out that the majority's analysis would be quite different in cases where an association's membership consisted entirely of schools from the same state, many of which were public institutions. Id. The majority then cited two circuit court decisions which found that state athletic associations were state actors. Id. In the second sentence of the Footnote, the majority notes that the dissenters accept the proposition that the NCAA is not a state actor when it takes "joint action" with a private university, and that the majority of the NCAA's membership is private schools. Id. The inference to be drawn from this second sentence is that because the dissenters accept the idea that "joint action" [*39] between the NCAA and a private university would not transform NCAA action into state action, and because the NCAA is made up of primarily private universities, the NCAA cannot be considered a state actor based upon its membership. The majority is using the dissents "joint action" analysis to reinforce its own conclusion that the NCAA cannot possibly be a state actor because of its membership.

The Tarkanian case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages

in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is not a state actor because no one state controls [*40] the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.

The Sixth Circuit's opinion in Brentwood Academy misstates the Supreme Court's reasoning in Tarkanian. The Sixth Circuit explained that the TSSAA was not a state actor, in part, because "all nine justices agree that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'" *Brentwood Academy, 180 F.3d at 766* citing *Tarkanian 488 U.S. at 193 n. 13.* The problem with this analysis, however, is that this quoted line from Footnote 13 applies to the joint action question, not the membership question at issue in Brentwood Academy. In Brentwood Academy, the issue was not whether "joint action" between the TSSAA and Brentwood Academy [*41] transformed the TSSAA into a state actor, it was whether the TSSAA was a state actor because its members were primarily public schools, it was historically recognized by the state of Tennessee, and its Board was dominated by public school employees. As a result, there appears to be a serious disconnect between Tarkanian and the Sixth Circuit's reasoning in Brentwood Academy.

In the end, the Court concludes that the MHSAA is a state actor. The Court reaches this conclusion for four primary reasons. First, the actions of the MHSAA may be "fairly

attributed to the state" as evidenced by the fact that under the state compulsion test or the symbiotic relationship test, the MHSAA is a state actor. Second, the vast majority of circuit courts to consider this issue have concluded that state athletic associations such as the MHSAA are state actors. Third, the Brentwood Academy decision is not controlling in this case because (a) it cannot be reconciled with Footnote 13 in Tarkanian, and (b) by its own terms its analysis is limited to a unique factual situation - a private school alleging that a state athletic association is a state actor when it regulates that private school [*42] - not present here. Fourth, Footnote 13 of the Tarkanian decision indicates that the Supreme Court believes that state athletic associations, such as the MHSAA, are state actors. Therefore, the Equal Protection Clause claim survives Defendants' Motion for Summary Judgment and Motion to Dismiss.

III. Standing

Plaintiffs bear the burden of demonstrating standing. "To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." *American Federation of Government Employees v. Clinton, 180 F.3d 727, 732 (6th Cir. 1999)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992))*.

Organizations have standing to assert claims on behalf of members provided that three additional requirements are met. These requirements are "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; [*43] and (c) neither the claim asserted nor the relief requested requires

the participation of individual members." *Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977);* see also *American Federation, 180 F.3d at 732.*

In the context of a summary judgment motion, provided that there is sufficient evidence to create a genuine issue of material fact as to standing, the motion should be denied. See *Bennett v. Spear, 520 U.S. 154, 167, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); Kardules v. City of Columbus, 95 F.3d 1335, 1346 (6th Cir. 1996).* The Court has previously examined standing issues in relation to Defendants' Motion to Dismiss. In the Opinion and Order which resolved that Motion, the Court held that Plaintiffs had presented enough evidence to survive the Motion to Dismiss. (Dkt. Nos. 44 and 45.) Although Defendants have offered subsequent evidence and argument which undermines the credibility of Plaintiffs' position on the standing issue, the Court remains convinced that there are genuine issues of material fact still in controversy. Therefore, for the reasons [*44] stated here and the Court's prior rulings, Defendants' Motion for Summary Judgement for Lack of Standing is denied.

IV. Liability for Individual Defendants

The Court has previously considered whether the individual Defendants may be sued in their official capacity. (Opinion and Order Dkt. Nos. 44 and 45.) Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. See generally *Smith v. Metro Sch. Dist., 128 F.3d 1014, 1020 (7th Cir. 1997).* This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals. *Kentucky v. Graham, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985).* In this case, there is no question that the MHSAA Representative Council has control

over the MHSAA. Therefore, to the extent that the MHSAA is a viable Title IX defendant, so to are the members of the MHSAA Representative Council. As such, summary judgment is denied.

Conclusion

In 1924, the MHSAA was created by the State of Michigan to regulate interscholastic athletics. Coincident to the passage [*45] of Title IX, the MHSAA incorporated itself to operate as a private association, although its functions remained largely the same. Then, in 1995, after the Sixth Circuit's decision in Horner, the State of Michigan removed the "official designation" of the MHSAA, though its membership and function again remained unchanged. Since then, the MHSAA has continued to exercise de facto control over interscholastic athletic programs in the state of Michigan.

The various formulations of the MHSAA appear to have been motivated by a desire to avoid the requirements of Title IX and the Equal Protection Clause, not to alter its mission or purpose. Since resolution of Defendants' motions require that this Court not exalt from over substance, and instead inquire into the real and substantial legal acts of the Defendants, their arguments cannot prevail.

DATED in Kalamazoo, MI:

Jan 21, 2000

RICHARD ALAN ENSLEN

Chief Judge